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DUE PROCESS OF LAW IN STATE LABOR LEGISLATION

BY FOWLER VINCENT HARPER*

PART TWO

IV

*Statutes Relating to Conditions of Employment**a. Safety and Health*

State interference with conditions of employment, as determined by the strength of the contracting parties, by imposing requirements calculated to protect the safety and health of employes, has not been without interruption from the courts. In the earlier cases, when organized labor was not strong enough to enforce the most reasonable demands without assistance from the legislature, the courts were wont to look with astute eye upon the infringement of liberty of contract thus resulting. When the reasoning started with the assumption that liberty of contract was the rule and the employment of the police power of the State the exception, a decision unfavorable to labor invariably resulted. The conception of this liberty of contract as an absolute right with but few, if any, qualifications, provided a premise from which but one result could emanate. Any logical deduction therefrom was inevitably bound to result in the invalidation of statutes imposing health and safety requirements upon those who employ labor. When, however, opinions started with the qualified conception of liberty of contract with the police power, not as the exception, but as the general principle applicable, a weighing of interests usually resulted, which might or might not produce a result sustaining the statute.

Sometimes the acts were invalidated, in these early days, upon the grounds that both employer and employe were deprived of their liberty or property, but for the most part, the employer being the only one upon whom the expense of the measures fell, it was his liberty which was made the grounds for solicitude. As in the matter of hours of labor for employes, the courts apparently did not, at

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first, quite grasp the full significance of the issue presented. Thus a Pennsylvania court, in sustaining a statute requiring mine owners to provide for adequate ventilation, assumed that there was no doubt whatever about the validity of the measure.¹⁶⁶ "If the Commonwealth of Pennsylvania," observed the court, "through her legislature can police our towns and villages, why may she not police the coal mines within her borders? . . . If she recognizes, almost as a part of her organic law, applicable to the *property* of her citizens, the rule long ago grown into a maxim, *sic utere tuo ut alienum non laedas*, why may she not make it equally applicable to the *lives* of her citizens?"¹⁶⁷ But employers were not slow to make legal capital out of the liberty of contract notion. When Illinois, shortly after the Pennsylvania case, enacted a statute requiring mine owners to make or have made an accurate map of the workings of the mine, those who employed men to toil therein insisted that this was so unreasonable and so unfair that it deprived them of their property without due process of law. The court, though approaching the question cautiously, could find no great hardship imposed, and consequently sustained the act.¹⁶⁸ In both of these cases, the court assumed the attitude that the legislature must manifestly transcend its province before its action would be interfered with by the judiciary. The burden, in other words, was upon the liberty of contract advocates.

In 1885, the New York court invalidated an act prohibiting the manufacture of cigars in tenement houses.¹⁶⁹ Liberty of contract much impressed the judges. The police power problem was easily disposed of by denying that the act was a health measure at all.¹⁷⁰ "When a health law," it was declared, "is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the courts must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually

¹⁶⁶Williams v. Bosnell, 8 Phila. 534 (1873).

¹⁶⁷*Ibid*, 536.

¹⁶⁸Daniels v. Hilgard, 77 Ill. 640 (1875).

¹⁶⁹Re Jacobs, 98 N. Y. 98 (1885).

¹⁷⁰*Ibid*, 114.

aimed at and that it is appropriate and adapted to that end."¹⁷¹ The measure having no relation to a legitimate legislative objective, there was consequently no public interest to be weighed against the private interest, and consequently none was weighed.

When, however, the Supreme Court, in 1898, had committed itself to the proposition that labor in underground mines was of such great interest to the public that the legislatures could regulate the length of time thereof,¹⁷² the effect of *Re Jacobs* was of less significance. In 1902 Illinois requirements for the appointment of inspectors for mines, at the expense of the owners were sustained by the Federal Court,¹⁷³ and five years later it was found by the same high Court that liability might be imposed upon the owners for the willful failure of managers to provide a reasonably safe place for workmen.¹⁷⁴ It was not long until the Arkansas "full crew" act, requiring a certain number of trainmen for the operation of freight trains, was upheld by the Court.¹⁷⁵ Thereafter, at frequent intervals, the States constitutionally required entries of mines to be of a specific width,¹⁷⁶ building machinery and hoisting equipment to be guarded against,¹⁷⁷ barrier pillars to be left of suitable width between adjoining mines,¹⁷⁸ owners of mines to furnish certain conveniences, such as washhouses, for miners, upon request by a

¹⁷¹*Ibid*, 115.

¹⁷²*Holden v. Hardy*, *supra* (1898).

¹⁷³*St. Louis Consolidated Coal Co. v. Illinois*, 185 U. S. 203, 46 L. Ed. 872, 22 Sup. Ct. 616 (1902).

¹⁷⁴*Wilmington Mining Co. v. Fulton*, 205 U. S. 60, 51 L. Ed. 708, 27 Sup. Ct. 412 (1907). Cf. liability in maritime law of the vessel for tort caused by negligence of a compulsory harbor pilot. *The China*, 7 Wall. 53, 19 L. Ed. 67. But note the different rule of the common law, worked out on the theory of principal and agent. *Carruthers v. Sydebotham*, 4 Maule & S. 77 (1815); *Ramsdell Trans. Co. v. La Compagnie Generale Transatlantique*, 182 U. S. 406, 45 L. Ed. 1155, 21 Sup. Ct. 831 (1901).

¹⁷⁵*Chicago, R. I. & P. R. R. v. Arkansas*, 219 U. S. 453, 55 L. Ed. 290, 31 Sup. Ct. 275 (1911), followed in *St. Louis, I. M. & So. R. R. v. Arkansas*, 240 U. S. 518, 60 L. Ed. 776, 36 Sup. Ct. 443 (1916), as to switching crews.

¹⁷⁶*Barrett v. Indiana*, 229 U. S. 26, 57 L. Ed. 1050, 33 Sup. Ct. 692 (1913).

¹⁷⁷*Chicago Dock Co. v. Fraley*, 228 U. S. 680, 57 L. Ed. 1022, 33 Sup. Ct. 715 (1913).

¹⁷⁸*Plymouth Coal Co. v. Pa.*, 232 U. S. 531, 58 L. Ed. 713, 34 Sup. Ct. 359 (1914).

certain number of employees;¹⁷⁹ and an Indiana act providing for safety devices on cars and coaches of railroad trains was invalidated only because the Federal Safety Appliance Act had superseded the State law.¹⁸⁰ A Texas requirement, however, that conductors on passenger trains must have served two years as a conductor on a freight train, but prescribing no other qualifications, was adjudged insufficiently related to the public health to be within the police power.¹⁸¹ There were dissenting opinions, and it may or may not be of significance that the liberty which suffered most was that of trainmen seeking employment.

These later decisions are far removed from *Re Jacobs*. It is noteworthy that the constitutionality of enactments of safety laws on behalf of workmen was established by the Federal Supreme Court. Labor interests, after *Lochner v. New York*, learned that they could expect a liberal construction of statutes enacted for their benefit from the Supreme Court although, as we have seen in part and shall further see, State courts were striking blow after blow at the development of the doctrine that the interest of society in the relations between employer and employe was so great that the extent of constitutional latitude for such legislation was indeed a broad one.

¹⁷⁹*Booth v. Indiana*, 237 U. S. 391, 59 L. Ed. 1011, 35 Sup. Ct. 617 (1915). See also *Princeton Coal Co. v. Fetting*, 185 Ind. 675, 113 N.E. 236, 114 N.E. 406 (1916). In 1922 a similar statute of Kentucky was invalidated in the State court, not because the employer was deprived of his property without due process of law, but because the act was to take effect upon the approval of a body other than the General Assembly. *Commonwealth v. Beaver Dam Coal Co.*, 194 Ky. 34, 237 S.W. 1086 (1922).

¹⁸⁰*Southern R. R. v. R. R. Commissioner of Indiana*, 236 U. S. 439, 59 L. Ed. 661, 35 Sup. Ct. 309 (1915). In *People v. Harris*, 74 Misc. 353, 134 N. Y. S. 409 (1911), an act was upheld which required doors in factories to open outward, where practicable, and not be bolted or locked during working hours. An Indiana Act, however, requiring coal mine operators to employ a "sufficient" number of "shot firers" to inspect and fire all blasts, was unconstitutional. *Glendale Coal Co. v. Douglas*, 193 Ind. 73, 137 N. E. 615 (1922).

¹⁸¹*Smith v. Texas*, 233 U. S. 630, 58 L. Ed. 1129, 34 Sup. Ct. 681 (1914).

*b. Statutes Relating to Time and Method of Payment and
Amount of Wages*

The method and time of payment of wages has been the battle ground of many a bitter Constitutional contest in the courts. Early in the history of the growth of social legislation, both the power of the State to amend charters of corporations and the general police power were resorted to for justification of statutes regulating this phase of industrial activity. Both principles were met by the contention that the effect of such acts was to deny to those affected the liberty of contract protected by the Fourteenth Amendment. Different courses of decisions pricked out different paths and it was only after a slow and checkered history that the proposition was given serious consideration that only upon a basis of complete economic equality can freedom of contract be, in any sense, a reality.

Worn out and childish conceptions of liberty and naive notions of freedom have left their mark on this, as well as other phases of labor law, and while complete emancipation therefrom has not yet been realized, it is at least less remote than it was a half century ago. Courts at first were unable to understand what there could be in the condition or situation of the laboring man in mines to disqualify him from contracting in regard to the price or mode of determining the price of his toil,¹⁸² and consequently statutes which regulated the same were null and void. It was the laborers' liberty, however, that demanded protection. The courts would not countenance unconstitutional insults to his wisdom and sagacity. Thus an act which prohibited payment in store orders was "an insulting attempt to put the laborer under legislative tutelage," which was not only degrading to his manhood, but "subversive of his rights as a citizen of the United States."¹⁸³ Any law which prohibited the laborer from selling his toil for what he thinks best was "an infringement of his constitutional privileges, and consequently vicious and void."¹⁸⁴ But this, it must be obvious, is a patent perversion. "The only real right at issue," said Professor Freund, "in the wage payment acts is that

¹⁸²See *Millett v. People*, 117 Ill. 294, 302-303, 7 N.E. 631 (1886).

¹⁸³See *Godcharles v. Wigeman*, 113 Pa. St. 431, 437, 6 Atl. 354 (1886).

¹⁸⁴*Ibid*, 437.

of the employer, the right of the owner of the business to direct its internal arrangements according to his own discretion."¹⁸⁵

But the courts were trying to bolster up what, at bottom, must have been an ancient natural law argument. Inapplicable economic maxims were dragged in to beg the question further. The natural law of supply and demand was the best law of trade.¹⁸⁶ This notion was carried so far as to produce the invalidation of an act which did no more than prohibit manufacturers from selling merchandise and supplies to their employes at a greater percentage of profit than to others,¹⁸⁷ for it was an "attempt to do for private citizens, under no physical or mental disabilities, what they can best do for themselves."¹⁸⁸ The economic superiority of the one party to the contract over the other, was completely ignored by the courts in these decisions, as a consideration to which they were not entitled to attribute legal significance.

So shy were the judges of basing a decision boldly upon the right of the State to adjust economic inequalities under the police power, that the most absurd reason could be employed to uphold such a statute rather than the interest which the public might have in the welfare of laborers. Thus the Indiana court pronounced constitutional a measure prohibiting employes from making contracts in advance to accept anything but lawful United States money in payment for wages on the grounds that the government had sufficient interest in preserving the integrity of its legal tender to justify such an interference with liberty of contract.¹⁸⁹ "We can not conceive," said the court, "a case in which the assertion of the legislative power to regulate contracts has a sounder foundation than it has in this instance."¹⁹⁰ But most cases could not be determined even on such flimsy grounds, and liberty of contract was upheld at the expense of acts imposing fines for the withholding of any part of the wages of an employe engaged in weaving, for imperfections that might arise in the work,¹⁹¹ acts prohibiting mine owners and manufacturers

¹⁸⁵"Constitutional Labor Legislation," 4 *Ill. L. Rev.* 609, 616 (1910).

¹⁸⁶See *State v. Goodwill*, 33 W. Va. 179, 184, 10 S.E. 285 (1889).

¹⁸⁷*State v. Coal & Coke Co.*, 33 W. Va. 188, 10 S.E. 288.

¹⁸⁸*Ibid.*, 190.

¹⁸⁹*Hancock v. Yaden*, 121 Ind. 366, 23 N.E. 253 (1889).

¹⁹⁰*Ibid.* 371.

¹⁹¹*Commonwealth v. Perry*, 155 Mass. 117, 28 N.E. 1126 (1891). See

from operating "truck stores,"¹⁹² acts providing penalties for delay in payment of wages,¹⁹³ acts prohibiting payment in any other medium than in cash,¹⁹⁴ acts requiring payment of wages on the day of discharge,¹⁹⁵ acts requiring the weighing of coal at the mines,¹⁹⁶ and acts requiring monthly payments of wages.¹⁹⁷

Few enactments of this kind were upheld during the ninties although there were exceptions.¹⁹⁸ The Arkansas court was willing to concede the power to regulate payment of wages by corporations under the authority to amend charters, but the power could not be

also *Kellyville Coal Co. v. Harrier*, 207 Ill. 624, 69 N.E. 927 (1891), in which an act was declared unconstitutional which prohibited deductions from wages except for money, checks, and drafts as agreed, and which authorized a recovery for deductions.

¹⁹²*Frorer v. People*, 141 Ill. 171, 31 N.E. 395 (1892).

¹⁹³*San Antonio etc. Ry. Co. v. Wilson*, 4 Willson Civ. Cas. 323 (Tex.), 19 S.W. 910 (1892). The court here thought the act violated the equal protection clause. "If the legislature desires," went the opinion, "to interfere at all in the enforcement of labor claims, it must do so by laws equal in their operation, and protecting alike the interest of the employer and employe, for the law knows no favorites."

¹⁹⁴*State v. Loomis*, 115 Mo. 307, 22 S.W. 350 (1893); *State v. Wilson*, 61 Kan. 32, 58 Pac. 981 (1899).

¹⁹⁵*Leep v. St. L., I. Mt. & So. R. R.*, 58 Ark. 407, 24 S.W. 75 (1894). The act was unconstitutional as applied to natural persons, since it was quite harmless for private individuals to contract for the payment of wages at any time, but valid as to corporations under the power to amend charters, Chief Justice Bunn, dissenting, on the grounds that the act was unconstitutional as to both individuals and corporations.

¹⁹⁶In *Re House Bill*, No. 203, 21 Colo. 27, 39 Pac. 431 (1895). In *Jones v. People*, 110 Ill. 590 (1884), a statute was upheld which provided that a "track scale" be furnished by operators of mines, and that all miners paid by weight be paid on the basis of such weights. The act, as interpreted, left the parties free to contract to compute wages in any other way they might choose. But in *Harding v. People*, 160 Ill. 459, 43 N.E. 624 (1896), such provisions were found unconstitutional because they prohibited a contract to allow each miner, for his last car of the day, to average the weights of the others cars.

¹⁹⁷*Johnson v. Goodyear Mining Co.*, 127 Cal. 4, 59 Pac. 304 (1899).

¹⁹⁸*State v. Peel Splint Coal Co.*, 36 W. Va. 802, 15 S.E. 1000 (1892); *State v. Brown etc. Co.*, 18 R. I. 16, 25 Atl. 246 (1892); *Opinion of the Justices*, 163 Mass. 589, 40 N.E. 713 (1895); *Commonwealth v. Dunn*, 170 Mass. 140, 49 N.E. 110 (1898); *Woodson v. State*, 69 Ark. 521, 65 S.W. 465 (1899); *International Text-Book Co. v. Weissinger*, 160 Ind. 349, 65 N.E. 521 (1899).

extended to individuals.¹⁹⁹ But the Supreme Court of the United States paved the way for thoroughly establishing this phase of the police power when in 1899 it upheld a "payment on discharge" statute under the power of the State to amend charters²⁰⁰ and in 1901 a Tennessee act requiring redemption in cash of store orders.²⁰¹ The latter decision was clearly based upon the police power of the State to protect the public interest in the welfare of laborers, *Holden v. Hardy*,²⁰² being cited in support thereof. Three years later the Ohio mechanic's lien law was upheld,²⁰³ although the Ohio court had, in 1900 declared unconstitutional an anti-screen law because it was unfair to miners.²⁰⁴

In spite of these results, there were reactionary decisions in the twentieth century,²⁰⁵ but for the most part conditions showing a genuine social and economic evil together with some evidence from which reasonable men might think the measure applicable to the evil have been regarded as sufficient to enable the State to regulate such matters as payment of wages, with due process of law.²⁰⁶ Old

¹⁹⁹*Leep v. St. Louis I. Mt. & So. R. R.*, *supra*. This was the basis of the decision in *State v. Brown*, *supra*, but the Massachusetts cases, *supra*, rested not only on the power to amend, but upon the police power as well.

²⁰⁰*St. Louis, I. Mt. & So. R. R. v. Paul*, 173 U. S. 404, 43 L. Ed. 746, 19 Sup. Ct. 419 (1899).

²⁰¹*Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. Ed. 55, 22 Sup. Ct. 1 (1901).

²⁰²169 U. S. 366, 42 L. Ed. 780, 18 Sup. Ct. 383 (1898).

²⁰³*Great Southern Fire Proof Hotel Co. v. Jones*, 193 U. S. 532, 48 L. Ed. 778, 24 Sup. Ct. 576 (1904).

²⁰⁴*Re Preston*, 63 Ohio St. 428, 59 N.E. 101 (1900).

²⁰⁵*State v. Missouri Tie & Lumber Co.*, 181 Mo. 536, 80 S.W. 933 (1904); *Gordon v. State*, 51 Tex. Cr. 531 103 S.W. 633 (1907).

²⁰⁶*Johnson Lytle & Co. v. Spartan Mills*, 68 S. C. 339, 47 S.E. 695 (1904); *Shortall v. Puget Sound Bridge Co.*, 45 Wash. 290, 88 Pac. 212 (1907); *Keokee Coke Co. v. Taylor*, 234 U. S. 224, 58 L. Ed. 1288, 34 Sup. Ct. 856 (1914); *Regan v. Tremont Lumber Co.*, 134 La. 199, 63 So. 874 (1914); *Atkins v. Grey Eagle Coal Co.*, 76 W. Va. 27, 84 S.E. 906 (1915), anti-script laws upheld. *Seelyville Coal Co. v. McGlosson*, 166 Ind. 561, 77 N.E. 1044 (1906), [but see *Republic Iron and Steel Co. v. State*, 160 Ind. 379, 66 N.E. 1005 (1903)]; *Lawrence v. Rutland R. R. Co.*, 80 Vt. 370, 67 Atl. 1091 (1907); *New York Central & H. R. R. Co. v. Williams*, 199 N. Y. 108, 92 N.E. 404 (1910) [Cf. *Erie R. R. v. Williams*, 233 U. S. 685, 58 L. Ed. 1155, 34 Sup. Ct. 761 (1914)]; *Wynne v. Seaboard Air Line R. R. Co.*, 96 S. C. 1, 79 S.E. 521 (1913); *Arkansas Stave Co. v. State*, 94 Ark. 27, 125 S.W. 1001 (1910);

notions of the absolute protection of liberty of contract have been relegated to the discard, facts of an economic and social nature are considered in arriving at conclusions, and fictions about the invasion of the rights of the working man have been abandoned. But while the power itself to regulate such matters is no longer the subject of controversy, the courts have not failed to indicate that the exercise of the power is still subject to the due process requirements. Thus an indecent exercise thereof may still be unconstitutional. In 1920 the Michigan court could not uphold a statute, the violation of which made the employer liable in the sum of five hundred dollars for a failure to pay wages amounting to twelve dollars and thirty-two cents.²⁰⁷ It was not due process of law. The difference between the amount of wages due and the amount to which the penalty accrued was unreasonable and exorbitant.

A similar result was reached in 1923 in Indiana respecting an act imposing a fine for each day's delay in payment of wages after seventy-two hours from the time of leaving the employment.²⁰⁸ A similar result was reached with regard to an act requiring semi-monthly payments and providing, as did the Michigan statute, a ten per cent penalty for each day's delay after due.²⁰⁹ Likewise in 1923 an Illinois statute requiring employers to permit all workers to absent themselves from their labor for two hours on election days

State v. Cullon, 138 La. 395, 70 So. 338 (1915); State v. Missouri Pac. R. R., 242 Mo. 339, 147 S.W. 118 (1911); State v. McCarroll, 138 La. 454, 70 So. 448 (1915); Moore v. Indian Spring Channel Gold Mining Co., 37 Cal. App. 370, 174 Pac. 378 (1918); Manford v. Singh, 40 Cal. App. 700, 181 Pac. 844 (1919), acts regulating time of payment of wages from two to four times monthly and payment on discharge acts upheld. McLean v. Arkansas, 211 U. S. 539, 53 L. Ed. 315, 29 Sup. Ct. 206 (1909); Rail Coke Co. v. Ohio Ind. Comm., 236 U. S. 338, 59 L. Ed. 607, 35 Sup. Ct. 359 (1915); anti-screen laws or run-of-the-mine laws upheld. Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. Ed. 175, 32 Sup. Ct. 74 (1911), act making assignments of future wages invalid, except under certain conditions upheld. With this compare West Jefferson Woolen Mills, 147 Tenn. 100, 245 S.W. 542 (1922), in which an act was upheld which provided that no action be brought to charge an employer upon an assignment made by an employe for wages unearned at the time of the assignment, unless the same had been assented to by the employer.

²⁰⁷Davidow v. Wadsworth Manufacturing Co., 211 Mich. 90, 178 N.W. 776 (1920).

²⁰⁸State v. Martin, 193 Ind. 120, 139 N.E. 282 (1923).

²⁰⁹Superior Laundry Co. v. Rose, 193 Ind. 138, 138 N.E. 761 (1923).

without deducting therefor from their wages was invalidated because it was not due process of law.²¹⁰ So it seems clear that while the regulation of wage payment is certainly within the police power of the State, liberty of contract notwithstanding, that regulation must be decent, reasonable, calculated to remove genuine evils of a social and economic nature, and, on the whole, of such a character as not to materially interfere with the substantial terms of the contract as regards the amount of wages to be paid.

c. Statutes Relating to the Amount of Wages to be Paid to Laborers

The first attempts to secure regulation of the amount of wages to be paid were made with respect to public servants. As early as 1894 the New York court upheld an act affecting the wages of public employes.²¹¹ Three years later, however, it was found in Ohio that an ordinance of the City of Cleveland fixing a minimum wage for labor performed on city work was in conflict with the Ohio Bill of Rights and with the Fourteenth Amendment.²¹² Although Indiana held similarly,²¹³ the State Courts soon abandoned the grounds of these decisions and statutes have generally been regarded as constitutional when minimum wages were fixed for those working for the States,²¹⁴ upon analogy to hours of labor restrictions for public servants.

The next step was in the direction of minimum wages for women and children. While acts prescribing wages for public servants

²¹⁰*People v. Chicago, Mil. & St. P. R. R. Co.*, 306 Ill. 486, 138 N.E. 155 (1923).

²¹¹*Clark v. State*, 142 N. Y. 101, 36 N.E. 817 (1894).

²¹²*Bramley v. Norton*, 5 Ohio N.P. 183 (1897).

²¹³*Street v. Varney Electrical Supply Co.*, 160 Ind. 338, 66 N.E. 895 (1905). See also *People v. Coler*, 166 N. Y. 1, 59 N.E. 716 (1901) in which a minimum wage provision for public servants was invalidated because it violated the rights of cities.

²¹⁴*Ryan v. New York*, 177 N. Y. 271, 69 N.E. 599 (1904), as to employes hired directly by the State, distinguishing the *Coler* case, *supra*; *Mallette v. Spokane*, 77 Wash. 205, 137 Pac. 469 (1913); *Norris v. City of Lawton*, 47 Okl. 213, 148 Pac. 123 (1915); *Campbell v. City of New York*, 218 App. Div. 826, 219 N. Y. S. 782 (1927), affirmed in 244 N. Y. 317, 155 N.E. 628; *Morse v. Delaney*, 218 App. Div. 826, 219 N. Y. S., affirmed in 155 N.E. 628 (1927).

could be justified under the power of the State to determine conditions under which work should be performed for it, acts which fixed a minimum wage for employes in private industries must be constitutional if at all, under the police power only. In Oregon it was found that a statute providing for the determination of a minimum wage which should adequately supply the necessary cost to maintain women in health was not without due process of law.²¹⁵ The basis of the decision was that the act was reasonably calculated to accomplish a purpose within the police power of the State. The court was unable to say that the law was a plain, palpable invasion of rights secured by the fundamental law, and that it had no reasonable relation to the end sought.²¹⁶ The same question was disposed of in the same way in *Simpson v. O'Hara*.²¹⁷ Three years later, 1917, these decisions were affirmed by the Supreme Court with four dissenting votes, Mr. Justice Brandeis taking no part in the decision.²¹⁸

On the strength of the Federal decision, the Minnesota court sustained a wage law for women providing for a compensation "sufficient to maintain the worker in health and supply him with the necessary comforts and conditions of reasonable life."²¹⁹ Mr. Felix Frankfurter, as attorney for the Consumer's League and *amicus curiae*, filed a copy of his brief in *Stettler v. O'Hara*, giving the court the benefit of the data and results of his extensive sociological research in connection with the Oregon statute. Arkansas sustained, in like manner, a similar statute,²²⁰ as did Washington²²¹ and Massachusetts,²²² although the act in the latter State was not technically compulsory, the only penalty for violation thereof being a provision for the publication of the names of such employers as refused to comply with the prescribed wage. The court refused to recognize

²¹⁵*Stettler v. O'Hara*, 69 Or. 519, 139 Pac. 743 (1914).

²¹⁶*Ibid*, 535.

²¹⁷70 Oregon 261, 141 Pac. 158 (1914).

²¹⁸*Stettler v. O'Hara*, 243 U. S. 629 (1917). See Powell, "The Oregon Minimum Wage Cases," 32 *Pol. S. Q.* 296 (1917); see also Powell, "Minimum Wage Legislation," 12 *Minn. L. Rev.* 1 (1917).

²¹⁹*Williams v. Evans*, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504 (1917).

²²⁰*State v. Crowe*, 130 Ark 272, 197 S.W. 4 (1917).

²²¹*Larsen v. Rice*, 100 Wash. 642, 171 Pac. 1037 (1918); *Spokane Hotel Co. v. Younger*, 113 Wash. 359, 194 Pac. 595 (1920).

²²²*Holcombe v. Creamer*, 231 Mass. 99, 120 N.E. 354 (1918).

the constitutional protection urged of the employers' "right of privacy."

In 1923, however, the Supreme Court invalidated the minimum wage law for the District of Columbia which applied to women and children.²²³ Mr. Justice Sutherland, speaking for the Court, insisted on treating that phase of the police power which was here exercised to equalize the economic situation between employer and employe as exceptional, the rule being that freedom of contract forbade any legislative interference between capital and labor in their contractual relations. From such a premise, the Justice proceeded to examine and to classify the various exceptions which courts had allowed to the rule, and, finding minimum wage acts different in certain respects from any of these, arrived at the conclusion that to regulate wages for women's labor was not within the police power, and was therefore unconstitutional.²²⁴

The Court further objected to the act inasmuch as no definite standard was prescribed for the guidance of the administrative board in determining a "living wage," but it had been thought that the presence of a definite standard in similar statutes had long ceased to be a necessary provision.²²⁵ *Lochner v. New York*, long since regarded as obsolete in principle and result, though never expressly overruled, was cited and relied upon. There were vigorous dissents, of course, and the truth is that two completely different standards of reasonableness were applied, the one objective, the other purely personal and subjective. If a weighing of interests took place, the point of balance depended, it seems, not so much upon the interests themselves, but upon the manner in which they were weighed.

The Adkins case has been followed by the Federal courts,²²⁶ and

²²³*Adkins v. Children's Hospital*, 261 U. S. 525 (1923).

²²⁴*Ibid.*, 554. "The function of legal history comes to be one of illustrating how rules and principles have met concrete situations in the past and of enabling us to judge how we may deal with such situations in the present, rather than one of furnishing self sufficient premises from which rules are to be obtained by rigid deduction." Pound, in "The Scope and Purpose of Sociological Jurisprudence," 25 *Harv. L. Rev.* 140, 147 (1911). For criticism of *Adkins v. Children's Hospital* see 23 *Col. L. Rev.* 565 (1923).

²²⁵See *Mutual Film Co. v. Ohio Board of Censors*, 236 U. S. 230, 245, 59 L. Ed. 552, 35 Sup. Ct. 387 (1914).

²²⁶*Folding Furniture Works v. Ind. Comm. of Wis.*, 300 Fed. 991 (1924).

the Kansas court,²²⁷ the latter insisting that it was deprived by the Supreme Court decision from exercising its own independent judgment. The power to fix minimum wages for children, of course, is not affected by the Adkins case.²²⁸ Neither, it seems, does the case affect the power to fix minimum wages for laborers on public works, although the Supreme Court will apparently not fail to examine closely such acts to ascertain whether a violation thereof is sufficiently definite to support a criminal charge.²²⁹ In the latter case, it is without due process of law.²³⁰

V.

Statutes Relating to Incidents of Collective Bargaining

Within the past score of years legislatures have recognized what labor advocates have long insisted upon, namely that the economic struggle between labor and capital is such an unequal one that State control of the agencies of bargaining is necessary. As public opinion demanded, an increasing number of labor laws have been enacted in the several States to remedy the situation, the legislatures attacking the evil where, as they saw it, the danger was greatest, in the attempt to place labor and capital upon an equal footing as regards their respective bargaining powers.²³¹ The theory of the police

After the decision the statute was amended to require a "reasonable" instead of a "living" wage, with authority in the industrial commission to grant licenses for exceptions when it appeared that employers were not able to pay the reasonable wage determined by the commission. It is significant that one of the principle economic arguments for minimum wage laws is compromised in such a statute, namely, the principle that a business that cannot pay a "living" for at least a "reasonable" wage is a parasite supported at the expense of society. See also *Murphy v. Sardell*, 269 U. S. 530 (1925); *Donham v. West-Nelson Mfg. Co.*, 273 U. S. 657, 71 L. Ed. 400, 47 Sup. Ct. 344 (1926).

²²⁷*Topeka Laundry Co. v. Court of Industrial Relations*, 119 Kan. 12, 237 Pac. 1041. See also *Law and Labor*, 7, 252 (1925).

²²⁸*Stevenson v. St. Clair*, 161 Minn. 444, 201 N.W. 629 (1925).

²²⁹See *Connally v. General Construction Co.*, 46 Sup. Ct. 126.

²³⁰*Cf. State v. Read Co.*, 33 Wyo. 387, 240 Pac. 208 (1925).

²³¹Learned Hand points out that usuary laws present glaring examples of interference by the legislature to equalize bargaining power between two parties, one of whom has such an economic advantage over the other as to justify the interposition of legislative power. "Due Process of Law," 21 *Harv. L. Rev.*, 495, 505, n. 2. (1908).

power has been invoked as the legal justification for these regulations. Opposed to the police power the individualists have pitted the standard of due process of law, as protecting the traditional freedom of contract.

For a half century a strict application of this standard resulted in what has been called a fictitious equality between the laboring man and his employer.²³² Writers and judges as well as economists have recognized that, in fact, labor was not equal to capital in bargaining power.²³³ As early as 1898 the Supreme Court, in *Holden v. Hardy*,²³⁴ said:

"The legislature has also recognized the fact, which the experience of legislatures in many States have corroborated, that the proprietors of these establishments (underground mines) and their operators do not stand upon an equality and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employes, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health and strength. In other words the proprietors lay down rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide and the legislature may properly interpose its authority."²³⁵

That the legislature may interpose its authority, then, will scarcely be denied by reasonable men. Whether the particular instances of interference are such that a reasonable man might deem proper, to equalize the respective bargaining powers of the parties, are questions for the courts to decide. That labor may in general take concerted action to meet employers on an even basis is no longer denied,²³⁶ although such has not always been true either in America

²³²See *Dorsey Richardson, Constitutional Doctrines of Justice Oliver Wendell Holmes, Johns Hopkins Studies in History and Political Science*, XLII, 3, 36 (1924).

²³³See Pound, "Liberty of Contract," 18 *Yale L. J.* 454 (1909).

²³⁴169 U. S. 366, 42 L. Ed. 780, 18 Sup. Ct. 383.

²³⁵*Ibid.*, 397.

²³⁶See *A. T. Mason, Organized Labor and the Law*, 68, 69 (1925).

or in England.²³⁷ Thus in a famous dissent,²³⁸ Mr. Justice Holmes declared: "In present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him . . . If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins."²³⁹

The source of conflict has of late arisen out of the particular kind of concerted action which labor has seen fit to take. One of the commonest of these, of course, has been the strike. The right of workmen to stop work *en masse* has generally been unquestioned since *Commonwealth v. Hunt*,²⁴⁰ although prior to that case, the doctrine of criminal conspiracy had been freely employed to render unlawful, when done in combination, that which a single workman might do with impunity.²⁴¹ Two courses of conduct on the part of strikers, the boycott and the system of picketing, have received diverse treatment at the hands of the courts. The primary boycott in some jurisdictions has been declared to be unlawful;²⁴² the secondary boycott has been regarded by some courts as lawful,²⁴³ by others unlawful.²⁴⁴ Picketing in a peaceable manner and without violence has by the common law of most States been regarded as a

²³⁷See, *A. V. Dicey, The Relation between Law and Public Opinion in England*, 98, 99 (1905). By the Combination Act of 1800 trade unions were unlawful.

²³⁸*Coppage v. Kansas*, 236 U. S. 1, 26-27, 59 L. Ed. 441, 35 Sup. Ct. 240 (1915).

²³⁹*Cf. also C. B. & Q. R. R. v. McGuire*, 219 U. S. 549, 570, 55 L. Ed. 328, 31 Sup. Ct. 259 (1911).

²⁴⁰4 Met. (Mass.) 111 (1842).

²⁴¹See *Commons and Gilmore, Documentary History of American Industrial Society*, 233, and early cases in *F. B. Sayre's Cases on Labor Law*, as well as *Eddy, The Law of Combinations*, vol. I, (1901).

²⁴²See Mr. Justice Brandeis, dissenting, in *Truax v. Corrigan*, 257 U. S. 312, 364, note 28, 66 L. Ed. 254, 42 Sup. Ct. 124 (1921).

²⁴³In New York. See *Bossert v. Dhuy*, 221 N. Y. 342, 117 N. E. 582 (1917).

²⁴⁴In Illinois, Massachusetts and Maryland. See Brandeis' dissent, *supra*, 364, note 28.

legitimate means of bargaining,²⁴⁵ but otherwise when accompanied with violence.²⁴⁶

Excessive action on the part of employes, which the unions seemed unable to control, have resulted in the application of the injunction to such an extent that in many jurisdictions, labor has been deprived of the advantage which a more moderate indulgence in picketing would have permitted to it. The legislature, in some States, have at this point interposed their authority to balance the situation, and anti-injunction statutes have given rise to some of the most important and complex constitutional questions that modern labor legislation has precipitated.

Before this situation arose the occasional legislative interference had been most frequently advantageous to capital. This was not inconsistent with the development of the common law. Employers, at earlier stages of the law, were insistent advocates of an extensive police power, but as legislative tactics began to change, they became, in turn, equally blatant individualists. Economic interests gravely affected political views. But constitutional provisions have checked legislative action at all periods regardless of what decision general assemblies have arrived at as to whether labor or capital had the better of the economic argument.

City ordinances and State statutes prohibiting picketing entirely have been upheld by the courts,²⁴⁷ on the ground that the same constituted a valid exercise of the police power. It has even been said that the city *owed* the employer the duty to protect him in his busi-

²⁴⁵In New York; see *Mills v. U. S. Printing Co.*, 99 App. Div. 605, 91 N. Y. S. 185 and 199 N. Y. 76, 92 N.E. 214 (1910). The same rule is followed, it seems, in Ohio, Oklahoma and Missouri. See Brandeis dissent, *supra*. See also *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 66 L. Ed. 189, 42 Sup. Ct. 72 (1921).

²⁴⁶California and Illinois have held picketting, in itself, unlawful. See *Moore v. Cooks, Waiters etc. Union* No. 402, 39 Cal. App. 538, 179 Pac. 417 (1919). In *Atchison, Topeka and Santa Fe v. Ghee*, 139 Fed. 582 (1905) it was held that violence was unnecessary to effect an act of intimidation. See, in general, 34 *Harv. L. Rev.* 88 (1920). In New York if violence is used, all picketting may be enjoined. *International Tailoring Co. v. Hillman*, New York Law Journal, August 13, 1925, 7 *Law and Labor* 238 (1925). See also Brandeis' dissent, *supra*, n. 29.

²⁴⁷Ex parte *Williams*, 158 Cal. 550, 111 Pac. 1035 (1910); *Hardie-Tynes Manufacturing Co. v. Cruise*, 189 Ala. 66 (1914) 66 So. 657.

ness by such statutes.²⁴⁸ While other courts have found such measures invalid,²⁴⁹ as late as 1924 it was found that an ordinance of Indianapolis which was construed to prohibit peaceable picketing was not an unreasonable exercise of the police power.²⁵⁰

Concurrently, however, with legislation against picketing which was probably never very prevalent, there developed a tendency to legislate in behalf of organized labor to equalize the bargaining power of the parties. Thus attempts were made to prevent the discharge of employes for belonging to labor unions and to prevent contracts involving clauses forbidding membership in such unions. The State courts have uniformly held that such statutes were unwarranted by the police power, and so palpably unreasonable and arbitrary that they were not due process of law. They also deprived employers of an attribute of property which was within constitutional protection.²⁵¹ The Supreme Court has likewise similarly committed itself both as regards acts of Congress²⁵² and State legislatures.²⁵³

²⁴⁸Ex parte Stout, 82 Tex. Cr. 183, 198 S.W. 967 (1917).

²⁴⁹Ex parte Sweitzer, 13 Okl. Cr. 154, 162 Pac. 1134 (1917) but not on constitutional grounds; St. Louis v. Gloner, 210 Mo. 502, 109 S.W. 30 (1908); Hall v. Johnson, 87 Or. 21, 169 Pac. 515 (1917), although strikes as well as picketting were prohibited.

²⁵⁰Thomas v. Indianapolis, 195 Ind. 440, 145 N.E. 550 (1924).

²⁵¹State v. Julow, 129 Mo. 163, 31 S.W. 781 (1895); Gillespie v. People, 188 Ill. 176, 58 N.E. 1007; State v. Bateman, 7 Ohio N. P. 487 (1900); State v. Kreutzberg, 114 Wis. 530, 90 N.W. 1098 (1902); Coffeyville Vitrified Brick and Tile Co. v. Perry, 69 Kan. 297, 76 Pac. 848 (1904); Goldfield Consolidated Mines v. Goldfield Miners' Union, 159 Fed. 500 (1907); Re Berger, 33 Ohio C. C. 289 (1912); People v. Western Union Tel. Co., 70 Colo. 90, 198 Pac. 146 (1921); Cf. State v. Daniels, 118 Minn. 155, 136 N.W. 584 (1912); Jackson v. Berger, 92 Ohio St. 130, 110 N.E. 732 (1915); Montgomery v. Pac. Electric Ry. Co., 293 Fed. 680 (1923).

²⁵²Adair v. United States, 208 U. S. 161, 52 L. Ed. 436 (1907).

²⁵³Coppage v. Kansas, 236 U. S. 1, 59 L. Ed. 441, 35 Sup. Ct. 240 (1914). Mr. Justice Day attempted to distinguish the two cases, but Mr. Justice Holmes denied the difference. See Powell, 33 Pol. S. Q. 396, 404 (1918). In 1902 the Tennessee court pronounced void an ordinance of Nashville because it required all municipal printing to bear union labels. This was a violation of the Fourteenth Amendment as it deprived those not using union labels of liberty and of the equal protection of the laws in pursuing the avocation of the trade of printing. Marshall and Bruce Co. v. Nashville, 109 Tenn. 495, 71 S.W. 815 (1903). Cf. Baltimore & Ohio R. R. v. Bailey, 99 Ohio St. 312, 124 N.E. 195 (1919) where an act prohibiting corporations from compelling employer

But although neither Congress nor legislatures have the power to provide that membership in labor organizations shall not be sufficient grounds for discharge, it does not follow that the public interest in the continuation of the laborer's employment will not justify some infringement of the employer's right to hire and discharge at his pleasure whomsoever he may choose. Massachusetts attempted to prohibit a railroad from discharging an employe because of information as to his conduct until an opportunity was given him to make a statement in the presence of persons furnishing the information, but it was too violent an invasion of the liberty of the employer.²⁵⁴ The reasoning was similar to that employed in the *Adair* and *Coppage* cases. The employer might dispense with the services of his workmen at will without accounting to anyone for the reasons therefor. In 1921, however, the Texas court decided that legislation making it a crime to discharge an employe because of testimony given before the industrial welfare commission was valid, as within the power of the legislature to make laws for the welfare and betterment of the conditions of working people.²⁵⁵

The "liberty of silence" of employers has also been protected by the courts by the invalidation of acts requiring a service letter to be given when the employe leaves his employment, stating therein the reasons for the same.²⁵⁶ A Georgia court declared that this right to "speak or remain silent" was the "birthright of every citizen of Georgia"²⁵⁷ and in Texas it was asserted that liberty of contract was a "natural right" which could not be taken away.²⁵⁸ "Judges are apt to be naif," and they, no less than anyone else necessarily find that to which they are unaccustomed contrary to "natural" right. Here to speak or remain silent was a natural right which the government could not take from the citizen; the government could not

to join any association, or from withholding wages for dues was declared unconstitutional.

²⁵⁴Opinion of the Justices, 220 Mass. 627, 108 N.E. 807 (1915); Cf. *State v. Nashville etc. Ry. Co.*, 124 Tenn. 1, 135 S.W. 773 (1911).

²⁵⁵*Poye v. Texas*, 89 Tex. Cr. 225, 230 S.W. 161 (1921).

²⁵⁶*Wallace v. Georgia C. & N. R. R.*, 94 Ga. 732 (1894); *A. T. & S. F. R. R. v. Brown*, 80 Kan. 312 (1909); *St. Louis S. W. R. R. Co. v. Griffin*, 106 Tex. 477, 171 S.W. 703 (1914).

²⁵⁷*Wallace v. Georgia C. & N.*, *supra*.

²⁵⁸*St. Louis etc. v. Griffin*, *supra*.

take away the right because it was a natural right. And so the reasoning continued until the Supreme Court in 1922 upheld a Missouri act as a reasonable and therefor constitutional restriction of liberty of the employer for the purpose of protecting labor.²⁵⁹ A similar result attended the controversy over an Oklahoma act.²⁶⁰ If the liberty to make contracts was a "property" right of the employer, so also did a workman's reputation have pecuniary value to him. "What more reasonable," continued Mr. Justice Pitney, "than for the legislature of Missouri to deem that the public interest required it to treat corporations as having, in a particular degree, the reputation and well being of their former employes in their keeping, and to convert what otherwise might be but a legal privilege, or under prevailing custom, a 'moral duty,' into a legal duty, by requiring, as this statute does, that when an employe is discharged or has voluntarily left the service, it shall give him, on his request, a letter setting forth the nature and character of his service and its duration, and truly stating what cause, if any, led him to quit such service?"²⁶¹

It is difficult to determine from this decision just whether or not the Fourteenth Amendment imposes restrictions upon the States as to freedom of speech or silence, as the decision rests upon the conclusion that, even if the Constitution did so restrict the States, the infringement of that liberty by service letter acts was not an unreasonable one, but fairly fell within the police power. In *Patterson v. Colorado*²⁶² the Court had side-tracked the issue of the Amendment protecting against State interference with freedom of speech,²⁶³ and in 1925 the Court retreated from the dictum of Mr. Justice Pitney in the Prudential Insurance case, making for purposes of argument, the opposite assumption.²⁶⁴ It seems clear, however, that so far as service letters are concerned, there is no

²⁵⁹*Prudential Insurance Co. v. Cheek*, 259 U. S. 530, 66 L. Ed. 1044, 42 Sup. Ct. 516 (1922).

²⁶⁰*C. R. I. & P. R. R. v. Perry*, 259 U. S. 548 (1922).

²⁶¹259 U. S. 530, 546.

²⁶²205 U. S. 454, 51 L. Ed. 879, 27 Sup. Ct. 556 (1907).

²⁶³*Ibid.*, 462.

²⁶⁴*Gitlow v. People of New York*, 268 U. S. 652, 666 (1925).

constitutional impediment in the way of statutes requiring the same to be given employes upon leaving their employment.

Anti-injunction statutes have presented another difficult issue. In 1916 a Massachusetts act was challenged which (1) forbade the issuance of injunctions in labor disputes except to prevent irreparable injury to property or property rights, for which there was no adequate remedy at law; (2) declared the right to contract for labor not to be a property right, and (3) declared the combination to procure higher wages, less hours, etc., not unlawful, unless the acts to be done were unlawful. The controversy here was between two rival unions, wherein it was charged that the members of one had been intimidated by the other. The statute upon which defendant relied was declared unconstitutional²⁶⁵ and consequently null and void. In Arizona, there was a different conclusion respecting an anti-injunction statute of that State.²⁶⁶ In 1921 the Arizona case reached the Supreme Court of the United States and the State decision was reversed by a five to four Court. It was held to be an arbitrary interference with liberty of contract as guaranteed by the Fourteenth Amendment.²⁶⁷

The Arizona act purported to legalize peaceable picketing. The State decision rested upon the finding that there had been no violence used. It seems that in Arizona, prior to the statute, peaceable picketing had been unlawful and the court could see no invasion of the constitutional rights of employers in the removal of the presumption of the common law of the State that picketing of any kind induced breaches of the peace. The reasoning of the State court's opinion seems to be that inasmuch as there had been no violence employed, the picketing must have been peaceable and an act making peaceable picketing legal and affording legal protection to the same was not therefor unconstitutional.

The Chief Justice, however, in the majority opinion of the Supreme Court, apparently took the view that although no violence had been used, it did not necessarily follow that the picketing had been "peaceable." Thus he declares:

"It was not lawful persuasion or inducing. It was not a mere

²⁶⁵*Bogni v. Perotti*, 224 Mass. 152, 112 N.E. 853.

²⁶⁶*Truax v. Corrigan*, 20 Ariz. 7, 176 Pac. 570 (1918).

²⁶⁷*Traux v. Corrigan*, 257 U. S. 312, 66 L. Ed. 254, 42 Sup. Ct. 124.

appeal to the sympathetic aid of would-be customers by a request to withhold patronage. It was compelling every customer or would-be customer to run the gauntlet of most uncomfortable publicity, aggressive and annoying importunity, libelous attacks and fear of injurious consequences, illegally inflicted, to his reputation and standing in the community. No wonder that a business of \$50,000 was reduced to only one-fourth of its former extent. Violence could not have been more effective. It was moral coercion by illegal annoyance and obstruction and it was thus plainly a conspiracy."²⁶⁸

Although the statute purported to legalize peaceable picketing it seems that the Chief Justice treated the act, as interpreted by the State Court, as an attempt to legalize more than the mere results which ordinarily follow the calling of a strike, a secondary boycott and the peaceable persuasion of picketing. Thus he says:

"It is to be observed that this is not the mere case of a peaceable secondary boycott as to the legality of which courts have differed and States have adopted different statutory provisions. A secondary boycott of this kind is where many combine to injure one in his business by coersing third parties against their will to cease patronizing him by threats of a similar injury. In such cases the many have a legal right to withdraw their trade from the one, they have a legal right to withdraw their trade from third persons and they have the right to advise third persons of their intention to do so when each act is considered singly. The question in such cases is whether the moral coercion exercised over strangers to the original controversy by steps in themselves legal becomes a legal wrong. But here the illegality of the means used is without doubt fundamental."²⁶⁹

A distinction was urged between the present case and the *American Steel Foundries v. Tri-State Trades Council*,²⁷⁰ in which the clause of the Clayton Act containing a provision substantially the same as that in the Arizona Act in controversy and worded in practically the same way, was construed to legalize the placing by striking employes, of one representative at each point of ingress and

²⁶⁸*Ibid*, 327-328.

²⁶⁹*Ibid*, 330.

²⁷⁰257 U. S. 184, 66 L. Ed. 189, 42 Sup. Ct. 72 (1921).

egress to the plant, for the purpose of persuading by lawful means those who continued to work to join the strikers. In other words, if "peaceable picketing" be thus construed, it is not unconstitutional to prohibit injunctions aimed at such conduct. But the Chief Justice seems to regard this as something less than "peaceable picketing," or the acts done in the Arizona case as something more than "peaceable picketing." At any rate, he throws the burden of responsibility for the decision upon the interpretation placed upon it by the supreme court of the State. Thus by construing the acts of the strenuous "moral coercion" of the strikers in the *Truax* case as coming within the protection of the statute, the State court made it imperative for the Federal Court to invalidate the act. The Chief Justice also rested the decision upon the equality clause and was able to successfully distinguish the *American Steel Foundries* case on these grounds.

That Mr. Justice Holmes approached the situation from a different point of view, is forcibly indicated by his reasoning that he could not "understand the notion that it would be unconstitutional to authorize boycotts and the like in aid of the employes' or the employers' interest by statute when the same result has been reached constitutionally without statutes" by courts with whom he agreed.²⁷¹ The thought here seems to be that the "fundamental principles of justice" embodied in the Fourteenth Amendment cannot be violated by a statute embracing substantially what the common law has long supported, often, as the "natural rights" of citizens of this country.

But even the dissenters here would probably concede that there might be frequent situations wherein a similar process of reasoning would lead to results by no means consistent with the Amendment. It seems fair to say that the Chief Justice, in the majority opinion, is abandoning the conception of "peaceable picketing" which the Arizona act purports to legalize, and looks to the acts committed which the State court, by its interpretation, declared to be legalized by the statute. Statutes which protect such acts are unreasonable and void, whether the act protected be called "peaceable picketing" or by any other name. In other words, if acts complained of and

²⁷¹257 U. S. 343. See also Mr. Justice Pitney, dissenting. *Ibid*, 347-348-349.

proven in the record be peaceable picketing, any statute legalizing the same, is inconsistent with due process of law in the constitutional sense.

If this be a fair analysis of the law in the *Truax* case, it follows that the decision is not necessarily authority for the proposition that anti-injunction statutes, protecting the secondary boycott and "peaceable picketing," as understood in many States where such methods of collective bargaining have long been approved, are unconstitutional. It does fix the law, however, as regards statutes, interpreted by binding courts as legalizing such acts as were present in the *Truax* case. They are not due process of law.

In 1925 the Kansas court saved a statute similar to the one invalidated in *Traux v. Corrigan*, by construing it to be no protection to workers who drove off patrons from the employer's business by picketing,²⁷² and the New Jersey anti-injunction law has been held not to protect picketing in the absence of a strike.²⁷³ In 1925 two conflicting decisions were rendered by a lower court in Illinois.²⁷⁴ The uncertainty of the constitutionality of such acts seems to rest upon the State courts, and, it would seem that by following the interpretation of the Clayton Act in the *American Steel Foundries* case, such acts may be upheld. Any different conclusion would necessarily rest for its entire validity upon the theory advanced by the Chief Justice in *Traux v. Corrigan* that the equality clause is something different and affords a separate protection not embodied in due process of law. This distinction it is difficult to take seriously, however, and it seems exceedingly doubtful if it would support a decree of unconstitutionality, no other objection to the statute being tenable.

Another important development of the law with respect to collective bargaining, although but recently brought into dispute, seems clearly settled for the present at least, namely the matter of compulsory arbitration by State agencies in disputes arising out of the

²⁷²*Bull v. International Alliance etc.*, No. 414, 119 Kan. 713, 241 Pac. 459 (1925).

²⁷³*Gevas v. Greek Western Workers' Club*, (N. J.) 134 Atl. 309 (1926).

²⁷⁴*International Tailoring Co. v. Amalgamated Clothing Workers of America*, Superior Ct., Cook Co., Ill., see 7 *Law and Labor* 237; *Isidore Ossey v. Retail Clerks Union*, see 8 *Law and Labor* 5.

relation between employer and employee. For a number of years Australia has had in operation a system of arbitration designed to relieve the distress and public inconvenience which follow in the wake of strikes and lockouts. The Constitution, modeled in large part after that of the United States, grants power to the National Government to make provisions for the control of labor controversies which extend "beyond the limits of any one State." In pursuance of this power, the Court of Conciliation has been empowered with jurisdiction to settle all such labor disputes, their award being compulsory upon both employer and employee. The Court, in determining minimum wages, hours of labor and kindred questions, functions in much the same way as our State commissions, created for similar purposes. It examines closely statistics relative to living conditions in general, in an attempt to work out a wage basis conforming scientifically to economic and social conditions of the particular communities affected.²⁷⁵ Facts amassed are in part collected and submitted by the parties to the controversy, and in part obtained by independent research carried on by agencies of the State.²⁷⁶ Strikes and lockouts are offenses if the dispute extends beyond the limits of one State, compulsory arbitration being substituted for the force employed in industrial warfare.²⁷⁷ The social interest in the continuity of industrial operations and in the welfare of both employers and employees is made the basis of governmental interference in labor disputes. "Reason," says Henry B. Higgins, in describing the system, "is to displace force; the might of the State is to enforce peace between industrial combatants as well as between other combatants; and all in the interest of the public."²⁷⁸

In 1920 Kansas attempted to put in operation a system of compulsory arbitration not dissimilar to the Australian scheme. The Court of Industrial Relations was empowered to settle controversies arising out of labor disputes, including the fixing of minimum wages and determining the maximum hours of labor for certain kinds of

²⁷⁵See Higgins, "A New Province for Law and Order," 29 *Harv. L. Rev.* 11, 16-21; see also Higgins, 32 *Harv. L. Rev.* 189, 199-202 (1918).

²⁷⁶See Higgins, 29 *Harv. L. Rev.* 13, 33 (1915).

²⁷⁷*Ibid.*, 14.

²⁷⁸*Ibid.*, 14.

workers, among which were those employed in packing industries.²⁷⁹ In upholding the act so far as the wage fixing power was concerned, the State court, relying on *Wilson v. New*,²⁸⁰ declared:

"Compensation paid to working men for their labor is the most fruitful cause of industrial unrest and of the conditions produced thereby. The State is not powerless to regulate the wages to be paid for labor in those enterprises without the continuance of which the people must suffer."²⁸¹

In weighing the conflicting interests involved in this controversy, the Supreme Court arrived at a different conclusion.²⁸² Mr. Chief Justice Taft, speaking for the Court, insisted that the business involved in the issue was not one so clothed with a public interest as to justify State regulation of wages. *Wilson v. New* was distinguished on these grounds. *Adkins v. Children's Hospital* was then a very recent decision, which may, in part, account for the attitude toward the Kansas act.

In 1923 the Court cut another slice out of the Kansas statute when it declared it unconstitutional as applied to coal mines.²⁸³ The interest of the public, the Court thought, in preserving the continuity of the coal mining business was not great enough to justify a denial of rights so long enjoyed as those to strike to boycott and to picket. In these decisions whether it is the result reached by the Kansas Court of Industrial Relations or the process of the State in reaching that result, is not quite clear. Minimum wage enactments for private industries had been invalidated, and the prohibition of strikes was a matter which had been seldom attempted by the States.²⁸⁴ The variance of the results of the compulsory arbitration from the decisions of the Supreme Court and the common law

²⁷⁹See Court of Industrial Relations Act, c. 29, 1920. See also H. W. Humble, "The Court of Industrial Relations in Kansas," 19 *Mich. L. Rev.* 675 (1921).

²⁸⁰243 U. S. 332, 61 L. Ed. 755, 37 Sup. Ct. 298 (1917).

²⁸¹Court of Industrial Relations v. Wolff Packing Co., 109 Kan. 629, 641, 201 Pac. 418 (1921).

²⁸²Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L. Ed. 1103, 43 Sup. Ct. 630 (1922).

²⁸³Dorchy v. Kansas, 264 U. S. 286, 68 L. Ed. 686, 44 Sup. Ct. 323 (1923).

²⁸⁴But see *Hall v. Johnson*, *supra*.

in the great majority of States could perhaps account for the decisions in the Wolff and the Dorchy cases.

But in 1925 all doubts as to what the Court was doing to the Kansas act were dispelled. The statute was considered as it applied to hours of labor regulations, a phase of the police power which was then firmly established. But the Kansas statute was declared void in this respect also, leaving no room for doubt but that, regardless of the results reached, the way in which those results were accomplished was unconstitutional.²⁸⁵ It was clearly indicated that the validity of hours of labor regulation was not in issue; it was the validity of compulsory arbitration.²⁸⁶

These decisions may be regarded conclusive as to the constitutionality of compulsory arbitration while the public interest in the continuity of such industries is no greater than at present. But who can prophesy that such interest will not soon become paramount to the interest of employers and employes to settle their own difficulties with the economic weapons available to them? There must inevitably be conflict over industrial matters, for the interests of those who buy and those who sell labor are in conflict. Regulation is necessary and constitutional, but how far such regulation can be carried depends upon the application of an invariable standard to shifting facts, after the interests involved have been carefully weighed and evaluated. "Where there are more wills than one, there must come collisions of will—and disputes; and even if the directors of industry were to be elected there still would be need for regulation. Regulation has come to stay."²⁸⁷ Many intelligent students of our economic life have thought that democracy in industry will solve every problem; that representative internal man-

²⁸⁵Wolff Packing Co. v. Court of Industrial Relations, 267 U. S. 552 (1925). But the Industrial Court Act is still of some effect as regards its criminal features. See Dorchy v. Kansas, 47 Sup. Ct. 86 (1926). See 21 *Ill. L. Rev.* 727 (1927) with which compare 33 *Yale L. J.* 196 (1923). Cf. also Rhoden v. State, 161 Ga. 73, 129 S.E. 640 (1925) in which an act denouncing the enticing of another to leave his employment during the term of his service was upheld.

²⁸⁶*Ibid.*, 569.

²⁸⁷Higgins, "A New Province for Law and Order," 32 *Harv. L. Rev.* 105, 136 (1918).

agement can untangle the web of complicated interests.²⁸⁸ But this assumes that there will never be minority interests in industry or that they will be protected by majorities. It assumes that the public interest will never suffer in the compromises between captains of industry and of labor. It assumes that somehow economic equality can be achieved by political equality in internal management.

But the law, as guardian of interests superior in significance to those of either labor or capital, must jealously preserve, through reasonable restrictions, those features of industrial life which would impair the former were industry to settle its own problems. The question always is whether the infringements upon the interests of industrial combatants, whether of labor or of capital, is justified in view of the public interest affected.²⁸⁹ When the process of balancing interests resolves the proposition that compulsory arbitration is not incomprehensible to the reasonable man, as a means of effecting industrial peace, compulsory arbitration will no longer be contrary to the Fourteenth Amendment of the Constitution.

²⁸⁸Glenn Frank, writing for McClure Newspaper Syndicate, December 29, 1926, advocates "democracy in industry," suggesting that "Sound industrial management will recognize that, beneath and beyond all the conflicts between employers and employees over wages, hours, and working conditions, the real labor issue is the development of a representative government in industry that will be more realistic, more accurately adapted to the technical complexities of industry, and more workable generally than the representative government we have in politics." Again, "industry is beginning to realize a challenge to develop a workable democracy that takes fully into account both the technical and human factors."

²⁸⁹*Cf.* Powell, "Collective Bargaining," 33 *Pol. S. Q.*, 396, 407 (1918).